

JOURNAL OF ANTI-CORRUPTION LAW

2020 Volume 4 Number 1 Pages 80 - 117

THE VIABILITY OF LIFESTYLE AUDITS AS AN EMERGING ANTI-CORRUPTION TOOL IN THE PUBLIC SECTOR: CONCEPTS, ESSENTIALS AND PROSPECTS

Ben Sihanya* and Eric Ngumbi**

ABSTRACT

Lifestyle audits are viable tools in the fight against corruption. Unfortunately, they have not been sufficiently developed or adopted despite their effectiveness in combatting corruption. For long, countries have deployed diverse anti-corruption strategies under various international, regional and national legal frameworks. Despite these efforts, corruption continues to permeate every sector of national economies, with debilitating effects on development goals and the well-being of populations. Most of the anti-corruption strategies adopted, focus on the integrity of the operational systems of public institutions on the one hand, and personal integrity of their public officials on the other. The prevalence of corruption in Kenya and other African countries signals that the measures adopted so far are insufficient. This article therefore identifies lifestyle audits as an emerging and viable strategy that could be adopted in refocusing the anti-corruption war in the public sector. The 'lifestyle audits approach' primarily focuses on the integrity of an individual's personal wealth as the key driver of their lifestyle. Any lifestyle that depicts expenditure that is disproportionate to an individual's known legitimate income is an indicator of corruption and should attract investigations for possible assets recovery. Notably, there is no country that has developed model legislation specifically dedicated to lifestyle audits. This article explores the concepts, elements and prospects of lifestyle audits as an anti-corruption tool and presents a toolkit of the essentials of an ideal lifestyle audits framework for Kenya and Africa.

* JSD & JSM (Stanford), LLM (Warwick), LLB (Nairobi), PGD Law (KSL), IP and Constitutional Professor, University of Nairobi Law School. Email: sihanyamentoring@gmail.com and sihanya@sihanyaprofadv.co.ke.

** LLM (Nairobi), LLB (Nairobi), PGC Corruption Studies (Hong Kong), Anti-Corruption Law Practitioner. He is currently pursuing his Doctor of Philosophy (PhD) Degree in Public Law at the University of Nairobi Law School. Email address: engumbi2019@gmail.com and engumbi@students.uonbi.ac.ke

1. INTRODUCTION

Corruption is a global challenge that remains a major obstacle to development and prosperity in Kenya and many African countries.¹ The vice has permeated all sectors of national economies with debilitating effects on judicial, political and other governance² systems hindering their efficiency and effectiveness in public services delivery.³ Corruption undermines the rule of law, erodes public trust in governments, and prevents governments from effectively delivering on their mandates.⁴ It is due to this violation of the social contract that corruption has consistently remained a cause for concern across Africa and the globe.⁵

Globally, corruption is considered a major challenge in the efforts towards poverty eradication especially in Africa and other developing countries.⁶ It has been estimated that corruption, bribery, theft and tax evasion, as well as other illicit financial flows cost developing countries \$1.26 trillion per year.⁷ Analysts have opined that this amount is almost equal to the combined size of the economies of

-
- 1 United Nations Development Corporation (2006) *Countering the global problem of corruption*, available at <http://www.unodc.org/newsletter/200601/page004.html> (visited 29 May 2020).
 - 2 According to the UN, good governance must espouse eight factors including transparency, accountability, participation, inclusiveness and equity among others. See United Nations "What is Good Governance?" at <https://www.unescap.org/sites/default/files/good-governance.pdf> (visited 18/6/ 2020).
 - 3 South Africa and Kenya are among the African countries that have constitutionalized national values, principles and ethos to fight corruption, for instance in Kenya, Article 10 of the Constitution provides for national values and principles of governance while Article 232 prescribes the values and principles of public service. See Ben Sihanya (forthcoming 2021) "Constitutional values, principles, policy: and culture: Agency, structure, politics and culture in Kenya and Africa," in Ben Sihanya (2021) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.
 - 4 World Economic Forum (2019) *Corruption is a first world problem, too*, available at <https://www.weforum.org/agenda/2014/11/corruption-is-a-first-world-problem-too/> (visited 21 May 2020).
 - 5 See World Bank (2020) available at <https://www.worldbank.org/en/topic/governance/brief/anti-corruption> (visited 24 May 2020).
 - 6 Vito Tanzi (2020) *Corruption Around the World: Causes, Consequences, Scope and Cures* available at <https://www.imf.org/external/pubs/ft/wp/wp9863.pdf> (visited 21 May 2020).
 - 7 World Bank (2011) "World Bank Indicators Database." See also Oxfam Discussion papers (2012) "A safe and just space for humanity," at <https://www.oxfam.org/en/research/safe-and-just-space-humanity> (visited June 18, 2020).

Switzerland, South Africa and Belgium.⁸ It has also been estimated that the amount of funds lost due to corruption in Africa is sufficient to lift 1.4 billion people who survive on less than \$1.25 a day, above the poverty threshold and sustain them at that level for at least six years.⁹ Separately, a 2013 report indicated that over 50% of workers across Europe, the Middle East, Africa and India agreed that bribery and corruption are acceptable ways to survive an economic recession.¹⁰

Studies show that an average of 76% of groups across 34 African countries cite corrupt political leaders as a major obstacle to national development in their countries.¹¹ Relatedly, the Global Corruption Barometer–Africa shows that the range of corruption challenges that African citizens face is complex and multifaceted, requiring fundamental and systemic changes.¹² Legal and political analysts agree that the challenge of corruption in Africa is not only attributable to an inadequate legal or policy framework, but also poor implementation and enforcement of existing laws.¹³

Dr Willy Mutunga, when he served as Kenya’s Chief Justice (CJ), remarked that Kenya had become a ‘bandit economy’ despite the country’s enactment of a new and progressive Constitution in 2010, and the enactment of numerous legislation¹⁴ on integrity and ethics.¹⁵ This observation about Kenya rings true for almost all African countries.

8 World Economic Forum (2019) at 4.

9 World Economic Forum (2019) at 9.

10 Ernst J and Young P (2013) “Navigating today’s complex resources-resources-business risks Europe Middle East, India and Africa Fraud Survey 2013,” at [https://www.ey.com/Publication/vwLUAssets/Navigating_todays_complex_business_risks/\\$FILE/Navigating_todays_complex_business_risks.pdf](https://www.ey.com/Publication/vwLUAssets/Navigating_todays_complex_business_risks/$FILE/Navigating_todays_complex_business_risks.pdf), at page 8, (visited June 18, 2020).

11 Pew Research Center (2014) *Crime and Corruption Top Problems in Emerging and Developing Countries*,” at <https://www.pewresearch.org/global/2014/11/06/crime-and-corruption-top-problems-in-emerging-and-developing-countries/> (visited 21 May 2020).

12 Transparency International (2019) *Global Corruption Barometer Africa 2019*, available at <https://www.transparency.org/en/publications/gcb-africa-2019> (visited 21 May 2020).

13 Eric Ngumbi (2019) *Viability of Lifestyle Audits as an Anti-Corruption Strategy in Kenya: A Critical Assessment of the Policy, Legal and Administrative Framework*, a thesis submitted to the University of Nairobi Law School in partial Fulfilment of the requirements for the award of the Degree of Master of Laws, at SSRN: <https://ssrn.com/abstract=3600509> (visited 29 May 2020).

14 Some of the other laws enacted in Kenya include the Public Officers Ethics Act which provides for periodic declaration of income, assets and liabilities by public officials and the Anti-Corruption and Economic Crimes Act, 2003, the principle statute governing investigations, prosecution and punishment for corruption.

In response to the corruption pandemic, numerous international, regional and national initiatives have been introduced and are periodically reviewed ostensibly to enhance their effectiveness. At the international level, mitigation of corruption is at the centre stage of the United Nation's Sustainable Development Goals (SDGs).¹⁶ Many countries have signed and ratified the United Nations Convention Against Corruption (UNCAC) which provides numerous measures that member states should take in the criminalisation, prevention and international cooperation in taming the scourge of corruption. The implementation of UNCAC is complemented by numerous initiatives at the regional and national levels, designed based on each country's needs and unique circumstances.¹⁷

An analysis of the initiatives adopted so far indicates that most states focus on strengthening integrity and accountability systems, as well as the regulation of personal conduct of public officials. This strategic focus on systems integrity and personal integrity is operationalised through various national policies, as well as legal and administrative frameworks. The most prevalent anti-corruption frameworks provide for the establishment of anti-corruption agencies, investigation and prosecution of corrupt conduct, assets disclosure systems and codes of conduct and ethics for public officials. For instance, Kenya enacted the Leadership and Integrity Act, 2012 that provides for the application of Chapter 6 of the Constitution of Kenya, 2010 on Leadership and Integrity, as one of the

15 Omondi D (2016) "Survey: Kenya ranked third most corrupt country in the world," (2016) *The Standard*, 26/2/2016, at <https://www.standardmedia.co.ke/article/2000193065/survey-kenya-ranked-third-most-corrupt-country-in-the-world> (visited 29 May 2020). See also Njeri Mbugua (2019) "Kenya features among the most corrupt countries," *The Star*, 16/2/2019, Nairobi, at <https://www.the-star.co.ke/news/2019-02-16-kenya-features-among-the-most-corrupt-countries/> (visited June 14, 2020). See also Article 10 on national values and principles of governance, Article 201 on values and principles of public finance, Article 232 on values and principles of public service, and Chapter 6 on Leadership and Integrity, Constitution of Kenya, 2010.

16 World Bank (2018) *Combating Corruption*, available at <https://www.worldbank.org/en/topic/governance/brief/anti-corruption> (visited 29 May 2020).

17 For example, African Union has adopted the "Africa Agenda 2063" with specific goals aimed at enhancing the fight against corruption and promotion of good governance in the quest for prosperity of the African continent.

fundamental legal frameworks to entrench accountability and combat corruption in Kenya's public service.¹⁸

The challenge of corruption still abounds in both developed and developing countries¹⁹ despite the elaborate initiatives which are continually reviewed ostensibly to address changing needs, emerging forms and patterns of corruption and experiences of specific countries. This is evidenced by various statistical reports and analyses of the prevalence of corruption. For instance, according to the 2019 Corruption Perception Index by Transparency International, Western Europe and the European Union were rated at an average of 66 points out of the possible 100, while Sub-Saharan Africa attained the lowest score of 32 points.²⁰ It is therefore clear that Africa, and especially Sub-Saharan Africa, is worst hit by the corruption pandemic, a situation that could explain the state of bad governance and the low level of development which is characteristic of the continent.

Remarkably, David Ndiu has argued that although countries such as Kenya have employed the 'most elaborate legal and institutional anti-corruption infrastructures in the world,' no significant strides have been made in as far as preventing and combating corruption is concerned.²¹ According to him, the fight against corruption should be characterised as a software problem rather than a hardware challenge.²² This article contends that the establishing of institutions and enactment of laws are not enough for any country to effectively control corruption. The design, substance, or content of the institutional and legal frameworks, together with their mode of implementation, is equally most important. It is the content of the anti-corruption law that accords to Ndiu's 'software problem' argument.

18 The Leadership and Integrity Act, 2012 is enacted pursuant to Article 80 of the Constitution of Kenya to provide procedures and mechanisms for the effective administration of Chapter 6 of the Constitution on leadership and integrity.

19 In July 2019, the Transparency International released a list of 25 corruption scandals that elicited global concern including the Panama papers, Siemen's corruption in Germany and Spain's corruption scandal, among others. See Transparency International (2019) "25 Corruption Scandals that shook the World," at <https://www.transparency.org/en/news/25-corruption-scandals> (visited June 19, 2020).

20 Transparency International Global Corruption Perception Index, 2019.

21 Ndiu D (2019) "Corruption and the two publics: An address that will not be given at the Anti-Corruption Convention," *The Elephant*, at <https://www.theelephant.info/oped/2018/08/04/corruption-and-the-two-publics-an-ad-dress-that-will-not-be-given-at-the-anti-corruption-convention/> (visited 29 May 2020).

22 Ndiu (2019) at 21.

The lifestyle audits approach advanced in this article will therefore augment the content and design of anti-corruption laws in the pursuit of more efficiency and effectiveness. This will be done through re-focused anti-corruption strategies to the wealth that has been unlawfully or corruptly acquired. Confiscating the corruptly acquired wealth would effectively bring to a halt the motivation for corrupt conduct. In a landmark judgment in Kenya relating to forfeiture of unexplained assets, the Court of Appeal set a critical standard in the determination of lawful acquisition of wealth. The Court held that first, 'you either prove how you acquired it, or lose it to the state' and second, that the right to property under the Constitution does not extend to unlawfully acquired property.²³ The Court also emphasised that an invitation to prove lawful acquisition of property is not an invitation to prove one's innocence. This is sound jurisprudence that could support lifestyle audits.

The deep-rooted nature of corruption especially in Kenya and other African countries is further summed up in the work of Nigerian scholar, Peter Ekeh as follows

Corruption is a *sine qua non* of the post-colonial African State. You, ladies and gentlemen, are its handmaidens. Its unwritten law is that it is legitimate to rob the civic public in order to strengthen the primordial public. Until this law is repealed, so it will remain.²⁴

This calls for rethinking the anti-corruption strategies and approaches adopted so far with a view to reinvigorating them or refocusing the fight to register meaningful strides.

Increasingly, a number of countries are beginning to explore other innovative methods in a bid to effectively curb corruption.²⁵ Lifestyle audits is one of the emerging strategies geared towards fixing the accountability paradox²⁶ in

23 *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission* [2020] eKLR. This was a Supreme Court decision affirming the lower Court of Appeal decision. Lawfully acquired property is protected under Art. 40 of the Constitution.

24 Ekeh P (1975 "Colonialism and the two publics in Africa," *Comparative Studies in Society and History* at 19.

25 Muthomi Thiankolu (2018) "13 ways to combat corruption in Kenya," *The Standard*, 25/5/2018, at <https://www.standardmedia.co.ke/article/2001281726/13-ways-to-combat-corruption-in-kenya> (visited June 15, 2020).

26 See Bwire Mugolla (2018) "Lifestyle Audit Bill will boost war against corruption," *The Standard*, Nairobi, June 2018, at <https://www.nation.co.ke/kenya/blogs->

the public sector. Basically, a lifestyle audit is a process of inquiry aimed at ascertaining whether or not the lifestyle of an individual accords to the individual's known legitimate sources of income.²⁷

For example, in recognition of the potential efficacy of lifestyle audits to combat corruption, Kenya and South Africa have pronounced themselves on the need for comprehensive lifestyle audit frameworks anchored in law through dedicated legislation. In launching lifestyle audits in South Africa, President Cyril Ramaphosa established a Technical Task Team consisting of himself as President, the Auditor-General, the South African Police Service, the South African Revenue Service, the State Security Agency, the Anti-Corruption Task Team, the Office of the Public Service Commission and the Financial Intelligence Centre.²⁸ The goal of the Task Team was to make recommendations on strengthening anti-corruption frameworks including the introduction of a dedicated legal framework on lifestyle audits.²⁹

According to President Ramaphosa, the audits would help strengthen public sector accountability through financial disclosures among Ministers and civil servants.³⁰ Similar measures have been attempted in Kenya through President Uhuru Kenyatta's post-2015 proclamations on the critical role of lifestyle audits in the fight against corruption. President Uhuru Kenyatta offered to be the first one to undergo a lifestyle audit in Kenya, to lead by example.³¹ Subsequently, the Senate

opinion/letters/lifestyle-audit-bill-will-boost-war-against-corruption-215990 (visited June 19, 2020).

- 27 This can also be applied in a country like Angola in light of the endemic corruption in its Government shown by the Luanda leaks published by International Consortium of Investigative Journalists, See Soren KJ (2020) "The messy reality of Corruption in Angola goes beyond the 'Luanda leaks,'" 27/1/2020, at <https://www.worldpoliticsreview.com/articles/28496/in-angola-corruption-goes-beyond-the-luanda-leaks> (visited June 21, 2020).
- 28 South African Government News Agency (2018) "Lifestyle audits to strengthen financial disclosures, fight corruption," *SA News*, available at <https://www.sanews.gov.za/south-africa/lifestyle-audits-strengthen-financial-disclosures-fight-corruption> (visited 29 May 2020).
- 29 In Kenya, President Uhuru Kenyatta also formed a Multi-Agency Taskforce (MAT) to conduct lifestyle audits of all public officials in 2018. However, of major concern, was the effectiveness such a process in countries where corruption is perceived to be propagated by the Executive itself.
- 30 South African Government News Agency (2018) at 27.
- 31 Rael Ombuor (2018) "Kenya's President Mandates Lifestyle Audit for Public Servants," *Voice of Africa*, 16/6/2018, at <https://www.voanews.com/africa/kenyas-president-mandates-lifestyle-audit-public-servants> (visited June 18, 2020).

of the Republic of Kenya published the Lifestyle Audits Bill, 2019.³² The aforementioned developments in Kenya and South Africa affirm that lifestyle audits are increasingly being perceived as a viable strategy for combating and preventing corruption. Consequently, there is an attempt to shift the focus of fighting corruption on the lifestyles of public officials. Lifestyle audits focus on the integrity of the wealth of public officials as demonstrated through the lifestyles they lead. This is predicated on the belief that by virtue of their access, control and custody of public property, an inclination to engage in corruption could be easily executed.

To-date, no country has enacted legislation specifically dedicated towards the evaluation of lifestyles of public officials as a mechanism for fighting corruption. However, there are limited aspects of lifestyle audits embedded in general anti-corruption frameworks such as asset disclosure and other frameworks. For example, Kenya, India and the United Kingdom's laws contain provisions for forfeiture of assets in the possession of a public official if the official is unable to satisfactorily demonstrate that the assets were acquired lawfully.³³

This article explores the concept of lifestyle audits as a potentially effective mechanism for the fight against corruption by focusing on the lifestyles of all the public officials who are entrusted with the custody, control and management of public resources. The thrust of the argument is that people acquire wealth for the purpose of enhancing the quality and standard of their lives. If an individual's lifestyle exhibits expenditure above his or her known legitimate sources of income it may be an indication of corruption, in the absence of any legal, reasonable and legitimate explanation to the contrary.

Given that the implementation of existing anti-corruption laws has been a major challenge for many African countries, enhanced use of lifestyle audits could bolster public sector accountability in various ways. First, lifestyle audits can be proactively carried out even without any suspicion of corrupt conduct on public officials serving in functional areas considered to be susceptible to corruption. This could ensure early detection of corruption and immediate intervention thus serving a preventive approach. This approach is contrary to reactive measures where corrupt conduct occurs and public resources are lost.

32 The Lifestyle Audit Bill, 2019 available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/TheLifestyleAuditBill_2019.pdf (visited 25 May 2020).

33 In Ethiopia the law makes it criminal for a public officer to be possession of "unexplained assets." See Katiba Institute (2018) "Lifestyle audits and the Constitution," 6/6/2018, at <https://katibainstitute.org/lifestyle-audits-and-the-constitution/> (visited June 19, 2020).

Second, unlike other strategies that focus on the integrity of the public sector systems on one hand, and integrity of public officials on the other, lifestyle audits focus on the integrity of the personal wealth of the custodians of public resources through the audit of their lifestyles. The final goal of lifestyle audits is to have any unexplained assets that are disproportionate to the known legitimate sources of income of public officials forfeited to the state. This takes away the motivation for corrupt conduct.

Third, although lifestyle audits are not conclusive in nature, they provide key indicators that a public officer has engaged in corruption.³⁴ Lifestyle audits could also help unearth adverse information against a suspect, information that can successfully be used as evidence against such a person for the purpose of criminal prosecution.

In Kenya, the National Prosecution Policy, 2015 identifies two basic components that should inform the decision by the Director of Public Prosecutions (DPP) to prosecute a case.³⁵ First, that the evidence available is admissible and sufficient. Second, that the public interest requires that where evidence discloses a criminal act, a prosecution be conducted. Hence the DPP must always apply both the evidential and public interest tests in determining whether to prosecute. A lifestyle audit process which unearths sufficient evidence of corruption should therefore lead to immediate prosecution of the suspect if the evidential test is applied.

This article argues that lifestyle audits need not lead to prosecution. Where a lifestyle audit is conducted and evidence of impropriety is established but does not meet the threshold for conviction, other administrative sanctions such as suspension or removal from public office can be enforced and this could deter corruption.

This article proposes that lifestyle audits, if properly deployed, are an effective tool for combating and preventing corruption. The article has six major parts: Part 1 demonstrates the failure of previous anti-corruption strategies to effectively respond to the global challenge of corruption. Part 2 analyses the

34 Olusola KO (2019) "Unmasking Lifestyle Audit as a Proactive Mechanism to Root out Corruption the Case of South Africa," *Journal of Legal, Ethical and Regulatory Issues*, available at <https://www.abacademies.org/articles/unmasking-lifestyle-audit-as-a-proactive-mechanism-to-root-out-corruption-the-case-of-south-africa-8809.html> (visited 18 May 2020).

35 National Prosecution Policy, 2015, Part 4B.

practice of lifestyle audits as conceptualised and contextualised by different authors. Part 3 examines various anti-corruption frameworks with inherent lifestyle audit aspects which the article considers the basic elements of a lifestyle audit framework. Part 4 analyses possible challenges in the application of lifestyle audits in the fight against corruption. Part 5 presents an analysis of the essentials of an effective lifestyle audit regime that any African country desirous of effectively fighting and preventing corruption should consider. The authors conclude the article in part 6.

The research method used in this study is a qualitative analysis of available literature. This involved the review of law and policy as well as literature from various books, monographs, book chapters, journals, articles, journal articles, government reports and development blueprints that cover the subject and theme of the study.

2. CONCEPTUALISING LIFESTYLE AUDITS

The concept of lifestyle audits is still a subject of interrogation and analysis among various scholars. According to Jill Cottrell Ghai, a lifestyle audit simply means ‘a study of a person’s living standards to see if it is consistent with his or her reported income.’³⁶ Lifestyle audits have also been defined to mean audits consisting of analysis of amalgamated reports from various databases regarding the living standards and assets or income worth of an individual.³⁷

Lifestyle audits are investigative law enforcement and corruption prevention tools. The primary goal of a lifestyle audit is to detect corrupt conduct by ascertaining if the living standard of an individual is commensurate or in tandem with their income stream.³⁸ The lifestyle audit appeals to common sense that unusual excessive expenditure implies that the money is coming from somewhere.

In cases where the lifestyle audits reveal a significant gap between an employee’s income and his lifestyle, then further inquiries into the sources of the income supporting such lifestyle should be done. These inquiries may extend to any other gainful economic activities that such an employee may be engaged in as well

36 Ghai JC (2018) “Lifestyle Audit and the Constitution,” *Katiba Institute*, available at <https://www.katibainstitute.org/lifestyle-audits-and-the-constitution/> (visited 28 May 2020).

37 Powell S (2011) “Lifestyle audits are a critical management tool to identify fraud,” available at <http://documents.lexology.com/ae0e573a-4da1-41e1-9a50-7278870d4796.pdf> (visited 28 May 2020).

38 Powell (2011) at 37.

as any opportunities for possible corruption within the organisation that may be open to them.

Lifestyle audits primarily involve an investigation into the ways of living or lifestyle of a public officer to determine consistency with their income. This is premised on the belief that public officials who live beyond their means may be involved in corruption, because there is nothing else to explain that lifestyle until the contrary is proved. The lifestyle audit illuminates the public officer's properties, income, and standard of living.³⁹

Some commentators have analysed various parameters that can be used to assess whether there are ongoing fraudulent or corrupt activities.⁴⁰ A review of a suspect's consumer index can be considered in order to determine the reason for the sudden change in lifestyle. Consumer index is measured by adding the spouse's income, the family's declared assets and the average spending of the family every month. If it is discovered that the collective income cannot sufficiently fund the exhibited lifestyle, a reasonable suspicion that the person is living beyond his or her income can ensue thus leading to a presumption of corruption.⁴¹

However, it is noteworthy that a lifestyle audit alone is not an exact indicator that corruption is occurring.⁴² It is thus not conclusive evidence of corruption and is therefore not on its own fully effective in detecting incidences of corruption.⁴³ Indeed, the results of such an audit must be complemented with further evidence for any conclusive finding on corruption to be made. This is particularly so because an individual may sustain a flamboyant and ostentatious lifestyle as a result of inherited wealth, a family member who provides financial support or otherwise by the grace of God. Nevertheless, lifestyle audits are a justifiable and effective barometer of the extent of corruption risk within an organisation.⁴⁴

39 Ghai (2018) at 36.

40 Koigi. (2016) "Kenya turns to lifestyle audits to tame runaway corruption," Fairplanet, at <https://www.fairplanet.org> (visited 30 June 2020).

41 Koigi (2016) at 40.

42 Coenen TL (2009) *Expert fraud investigation*, Hoboken, NJ Wiley at 23.

43 Rooyen Van (2008) *The Practitioner's Guide to Forensic Investigation in South Africa*, Henmar, Pretoria, at page 96.

44 Powell (2011) at 37.

Kenya has made some effort in enacting legislation specifically designated for lifestyle audits on public officials.⁴⁵ Kenya's Lifestyle Audits Bill, 2019 refers to a 'lifestyle audit' as 'an investigative audit of a person's living standards to ascertain consistency with a person's lawfully obtained and reported income.'⁴⁶ It is particularly noted that this proposed legal definition in Kenya adopts the phrases 'lawfully obtained' and 'reported income.' This study finds the two phrases in the definition of lifestyle audits to be of utmost importance in the sense that the phrase 'lawfully obtained' signifies that the law does not criminalise wealth creation and accumulation by any Kenyan as long as it is done legally.

The law will only be applied where a public officer is unable to account for their possessions.⁴⁷ This appears to be the gist of the Lifestyle Audits Bill.⁴⁸ The Bill has recently received a major boost after the majority of the Kenyan Senate endorsed the legal framework where they expressed optimism that 'the Bill will sieve and unearth public officials who live beyond their stated means by using public resources to enrich themselves.'⁴⁹

The phrase 'reported income,' implies that the law is not concerned with the wealth that is lawfully created and accumulated provided the relevant taxes are duly paid and requisite returns made through reporting to the agencies established by law for that purpose. The Bill therefore defines a lifestyle audit to mean that failure to fully report one's income through tax returns or other prescribed modes could imply possible tax evasion, money laundering and other illicit activities constituting corruption.⁵⁰

The Kenyan Bill is the first of its kind to specifically provide for lifestyle audits, but it has significant gaps that could impair its effectiveness. For example, it is probable that the Bill may not yield the desired result if citizens are not expressly obligated to maintain records and relevant documents pertaining to the wealth and

45 See Rawlings Otieno (2020) "Bill proposes tougher lifestyle audit laws," *The Standard*, Nairobi, 9/3/2020, at <https://www.standardmedia.co.ke/article/2001363425/bill-proposes-tougher-lifestyle-audit-laws> (visited June 19, 2020).

46 Lifestyle Audit Bill 2019, sec 2.

47 Haggard S and Kaufman R (1995) *The Political Economy of Democratic Transitions*, Princeton University Press, New Jersey, USA.

48 See Clause 3 of the Lifestyle Audit Bill, 2019.

49 Julius Otieno (2020) "Tougher lifestyle audit law backed by senators," *The Star*, 12/3/2020, at <https://www.the-star.co.ke/news/2020-03-12-tougher-lifestyle-audit-law-backed-by-senators/> (visited June 19, 2020).

50 See Clause 2 of the Lifestyle Audit Bill, 2019.

properties they own or possess. If one is required to always be in a position to (convincingly) explain the source of their wealth, there should be a preceding requirement that relevant documents and records that prove interest or ownership should always be kept. The Kenyan Bill fails to make provision for such a requirement. In addition, the practicability of an individual keeping all records and documents that prove ownership of almost every asset they own, may be challenging. It may be prudent to require a person to maintain records on substantial properties only, such as land, motor vehicles, and any considerably valuable items or as may be prescribed in legislation.

The Kenyan Lifestyle Audit Bill also fails to address the gaps in the various legal aspects related to lifestyle audits. For example, wealth declaration by public officials in Kenya, which embodies lifestyle audit aspects as provided for under Part IV of the Public Officer Ethics Act, 2003 (POEA), remains a mere ritual in public service. The legal regime has loopholes of monumental magnitude that defeat the very purpose of providing for wealth declaration in Kenya's law books, in the first place. The underlying lifestyle objectives cannot therefore be met.⁵¹ Kenya should have cured these gaps through the proposed Lifestyle Audit Bill, 2019.

Kenya's Bill remains a key point of reference for any country seeking to develop legislation specifically dedicated to a comprehensive framework on lifestyle auditing.

2.1 Grounds for initiating lifestyle audits

The question of what would trigger a lifestyle audit on a person is important. Given that lifestyle audits are an intrusive investigative tool, there must be a proper and legitimate basis for subjecting a person to this process lest their constitutionally protected right to privacy is violated.⁵²

A lifestyle audit on a person must be preceded by certain reasonable circumstances which point to a particular transaction or activity which may involve possible corruption..⁵³ This standard is perhaps informed by the fact that a lifestyle

51 Ngumbi (2019) at 13.

52 Article 31 of the Constitution of Kenya 2010 on the right of privacy; Chapter 3 of the Constitution of Uganda on human rights.

53 See generally Purchasing and Procurement Center (2019) *Purchasing and Procurement Ethics, Gifts & Gratuities*, available at <https://www.purchasing-procurement-center.com/purchasing-and-procurement-ethics.html> (visited 21 May 2020).

audit is a complex, cumbersome and expensive process which also encroaches upon the privacy rights of the individual who is the subject of the lifestyle audit.⁵⁴

Despite the above, this article argues to the contrary that in Kenya and most other African countries where numerous public officers are corrupt,⁵⁵ there need not be a consideration of a strong basis before undertaking a lifestyle audit on a corruption suspect. Subject to the Constitution, the lifestyle audit tool should be applied proactively on all public officers randomly especially those working in corruption prone (or 'wet') areas as a measure to pre-empt engagement in illicit enrichment.

2.2 Objective of lifestyle audits

The primary objective of a lifestyle audit is to determine whether or not the assets of an individual that are disproportionate to the individual's lifestyle may have been corruptly acquired from public resources. If the findings of the lifestyle audit are in the affirmative, various legal processes can ensue. First and most significantly, such wealth can be, depending on the legal regime, forfeited to the state. Second, nothing prevents the prosecution of the suspect if the evidence gathered from the lifestyle audit can support a prosecution. To make such prosecution possible, there should be enabling constitutional and statutory provisions. This is a critical anti-corruption approach because, on the one hand, the motivation for corrupt conduct is removed by taking away the stolen property while, on the other hand, criminal prosecution has a deterrent effect. Significantly, unlike in a criminal case, the burden to prove that suspect property was not acquired as a result of corrupt conduct rests with the suspect.⁵⁶

Investigators, forensic auditors and management of organisations occasionally employ lifestyle audits to detect incidents of corruption in their organisational structures. Where lifestyle audits are conducted on employees, they

54 Powell (2011) at 37.

55 See United Nations Economic Commission for Africa (2016) *Measuring Corruption in Africa: The international Dimension Matters*," African Governance Report IV, p 16, available at https://www.uneca.org/sites/default/files/PublicationFiles/agr4_eng_fin_web_11april.pdf (visited 18 June 2020).

56 *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission* [2019] eKLR, Civil Appeal No. 184 of 2018.

are also referred to as 'suspect employee profiling,' or even euphemistically called 'business intelligence.'⁵⁷

Lifestyle audits provide a corruption detection and prevention mechanism⁵⁸ by enabling investigators to get information relating to an individual, sometimes in a discreet manner, which makes corruption investigations more effective.⁵⁹ In the end, lifestyle audits serve the legitimate purpose of ensuring that employees do not use their positions of trust for self-gain to the detriment of their employers.

Lifestyle audits are significant tools in law enforcement. They are crucial methods of identifying hidden assets and misappropriated funds through tracing. This is made possible by the background investigations that are normally done by investigators following the profiling of a suspect. A lifestyle audit may unearth undisclosed or undeclared income or assets, which may in turn allow for enhanced revenue collection by the Government, recovery of illicit or unexplained wealth, discovery of other offences connected to the person's subject to the lifestyle audit, and more importantly, deterrence of further corrupt conduct.

Background investigations help investigators to get tip-offs in the direction of misappropriated funds and hidden assets for easier recovery processes.⁶⁰ Locating assets hidden in the names of relatives and associated entities can quickly help to narrow down of the possible suspects by shining the spotlight on those living beyond their known financial means.⁶¹ This constitutes intelligence led investigations, a fundamental tool in the fight against corruption.

3. ELEMENTS OF A LIFESTYLE AUDIT FRAMEWORK

While there is general consensus by authors on the important role of lifestyle audits in the fight against corruption, this study did not find any country that has developed comprehensive legislation specifically dedicated to lifestyle audits. In Africa, Kenya is one of the countries which has in the 2018-2020 period experienced intensive debate on the need to develop a comprehensive legal framework on lifestyle audits. Indeed, at the time of writing, Kenya's Senate had

57 Deloitte S & Touche D (2002) *Canadian Forensic Services Methodology Training Manual*, Toronto: Deloitte & Touche LLP.

58 Shraibman F & Sampath VS (2011) *Forensic accounting for dummies*, Indianapolis, In Wiley.

59 Shraibman & Sampath (2011) at 58.

60 Madinger J & Zalopany SA (1999) *Money laundering – a guide for criminal investigations*, Boca Raton, FL: CRC Press, 1999.

61 Shraibman & Sampath (2011) at 58.

published the Lifestyle Audits Bill, 2019 and subjected it to consideration in Parliament.

In many countries, lifestyle audits are mainly embedded in the larger frameworks for the fight against corruption in public service. Lifestyle audits are encountered in: wealth declarations, tax administration tools, frameworks on anti-money laundering, procedures for recovery of unexplained wealth held by public officers, and the monitoring of local and foreign bank accounts. Lifestyle audits are underpinned in these anti-corruption frameworks because their enforcement involves interrogation of the lifestyles of the public officers to determine whether or not they have engaged in illicit enrichment or other corrupt practices. The ensuing sections consider these regimes and how they embody lifestyle audits.

3.1 Wealth declaration systems

Wealth declaration has been globally adopted as an accountability tool in public service.⁶² At the international level, article 8 of the United Nations Convention Against Corruption (UNCAC) requires all member states to put in place structures and frameworks to compel public officials to report 'to appropriate authorities their outside activities, employment, investments, assets and substantial gifts of benefits' (UNCAC, 2003). This is the international legal framework that effectively makes wealth declaration a requirement in the quest for public sector accountability.

Remarkably, other regional laws and policies provide for wealth declaration, including the Council of Europe Code of conduct for public officials. It provides that 'a public official who occupies a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare at regular intervals.'⁶³ Article 7 of the African Union Convention on Preventing and Combating Corruption (AUCPCC) mandates member states to *inter-alia* require all or designated public officials to declare their assets at the time of assumption of office, during, and after their term of office in the public service, in order to combat corruption and related offences in the public service.⁶⁴

62 See World Bank Public Sector and Governance Group (2013) *Financial disclosure systems declarations of interests, income, and assets*, available at <http://mcbcs://agidata.org/pam/> (visited 23 May 2020).

63 Council of Europe (2000) "Recommendations (2000)10 of the Committee of Ministers to Member States in Codes of Conduct" available at <https://rm.coe.int/16806cc1ec> (visited 23 May 2020).

64 Out of 55 member states of the African Union (AU), only 38 countries have ratified this Convention, while states including Angola, Swaziland, South Sudan and Sudan among others.

The AUCPCC also requires member states to submit regular state reports on how they have implemented this convention. According to a 2015 report by the AU, only 13 state parties of the AUCPCC have submitted their state reports. This therefore, begs the question, have regional bodies and conventions on tackling corruption, been effective especially with regard to implementation of the various legal frameworks with underpinned lifestyle audit provisions?

Moreover, different countries have enacted domestic laws making wealth declaration mandatory for public officers.⁶⁵ However, there are no prescribed international standards on how such systems should be developed and as such, many countries have established diverse asset disclosure mechanism(s) that suit their domestic circumstances and need.⁶⁶

The literature indicates that an effective income and assets declaration regime can enhance the fight against corruption as it can control the abuse of power and increase public accountability.⁶⁷ According to study reports, levels of corruption are perceived to be lower in countries where there are frameworks for disclosure of wealth and assets, and the subsequent verification and public access to the declarations.⁶⁸

The wealth of a person forms a critical component of their lifestyle. This is because logically, one's living standards are primarily pegged on income and material possessions. Wealth declaration therefore provides useful information for law enforcement agencies.⁶⁹ This information is useful in determining whether the

65 The proposed Lifestyle Audit Bill, 2019 in Kenya seeks to make lifestyle audit mandatory for all state and public officers

66 See Ngumbi E and Owiny P (2020) "From Paper to Practice: Enhancing Public sector Accountability in Africa through Reform of the Wealth Declaration Regimes" *Research Gate*, available at https://www.researchgate.net/publication/341380742_From_Paper_to_Practice_Enhancing_Public_Sector_Accountability_in_Africa_through_Reform_of_National_Wealth_Declaration_Systems (visited 19 May 2020).

67 Chêne M& Casey K (2008) "African experience of asset declarations," *Transparency International*, available at <https://www.u4.no/publications/african-experience-of-asset-declarations.pdf> (visited 14 May 2020).

68 Chêne & Casey (2008) at 67.

69 See Messick R (2009) "Income and assets declarations: Issues to consider in developing a disclosure regime," *Anti-Corruption Resource Centre*, paper prepared for Conference on Evidence-Based Anti-Corruption Policy organized by Thailand's National Anti-Corruption Commission (NACC) in collaboration with the World Bank, 5 – 6 June 2009, Siam City Hotel, Bangkok, Thailand.

value of the declarant's assets is commensurate with their legitimately known sources of income. Assets disclosure regimes allow verification of reported income against other records or registers in a government's custody, for instance the land register at the Ministry of Lands, tax records at Revenue authorities, as well as vehicle registers.

Through monitoring and verification of the declared assets, anti-corruption agencies can detect unusual fluctuations and assess them against the legitimate income of the declarant.⁷⁰ It is the monitoring and verification aspects of the public officer's wealth that constitute lifestyle audits.

The wealth declaration systems constitute a global mechanism that is applied in the prevention of illicit enrichment by public officers using their positions of trust over public resources.⁷¹ Compared to other mechanisms embodying lifestyle audits under this part, wealth declaration stands out as the universal mechanism that embodies lifestyle audits targeting public officials.⁷²

For wealth declaration frameworks to effectively serve the lifestyle audits purpose, the verification component must be robust and effectively enforced. Further, the declaration regime must permit access to the declarations. Electronic filing of the declarations is most preferable since it would enhance efficiency in data analysis and comparison with information held in other government agencies.⁷³ Ukraine, Rwanda, the United States of America and Hong Kong are some of the countries that have made notable progress in verification of declared assets thus promoting the adoption of lifestyle audits.⁷⁴

Contrarily, the absence of these key attributes in the assets disclosure regimes of many countries, especially African states such as Kenya, Uganda, Angola, Ghana and Cameroon, have remained the major obstacles in the pursuit of the accountability objectives of asset disclosure systems.⁷⁵ Other challenges to effective lifestyle audits through wealth declarations include large declaration

70 Jenkins M (2015) "Income and Asset Disclosure Topic Guide," Compiled by the Anti-Corruption Helpdesk, Transparency International.

71 Burbidge D (2015) *The Shadow of Kenyan Democracy: Widespread Expectations of Widespread Corruption*,

72 OECD Publishing (2011) "Asset Declarations for Public Officials: A Tool to Prevent Corruption," available at <http://dx.doi.org/10.1787/9789264095281-en> (visited 11 May 2020).

73 Chêne & Casey (2008) at 67.

74 Ngumbi & Owiny (2020) at 66.

75 Ngumbi & Owiny (2020) at 66.

intervals which delay detection of illicit enrichment, poor enforcement and little involvement of civil society organisations, media and the citizens in the accountability process.⁷⁶

3.2 Forfeiture of unexplained assets

Assets forfeiture is one of the strategies for combating and preventing corruption where an individual is found to be in possession of unexplained assets. Unexplained assets refer to a person's assets that are not commensurate with the person's legitimately known sources of income, and which were acquired at or around the time the person was reasonably suspected of corruption or economic crime.⁷⁷ A person in possession of such assets is presumed to have acquired them through corruption if no satisfactory explanation is given for the disproportionality.⁷⁸

Assets forfeiture is a form of lifestyle audit because it connotes a process of inquiry into the material possessions of an individual to arrive at the determination of possession of suspect property. The forfeiture could either be criminal or civil in nature. Criminal forfeiture of assets occurs during or after a criminal trial where the accused is ordered by the court to forfeit to the state the assets in question if such assets relate to the offence.⁷⁹ Given that criminal forfeiture is a sentencing option in criminal prosecution, it is not always an effective method for asset recovery due to the high standard of proof required in criminal cases.⁸⁰

On the other hand, the focus of civil forfeiture is the property as opposed to the person in possession of the property.⁸¹ In a civil proceedings for forfeiture of assets, law enforcement agencies need to prove only by a preponderance of the evidence that the suspect property has been corruptly or unlawfully acquired. This

76 Some scholars, including Dr Samwel Nyandemo, a Senior Economics lecturer at the University of Nairobi, have critiqued the effectiveness of wealth declaration in fighting corruption in Kenya due to lack a complementary enforcement mechanism. He states that "this process of submitting wealth declaration forms by public officers has been an exercise in futility since the degree of honesty is absolutely not there."

77 Sec 2 of Kenya's Anti-Corruption and Economic Crimes Act, 2003. Further, section 27(1) of ACECA provides that unexplained wealth held by an associate of a person suspected of corruption fall within the meaning of "unexplained wealth assets" under ACECA.

78 Doyle C (2018) *Crime and Forfeiture*, available at <https://fas.org/sgp/crs/misc/97-139.pdf> (visited 29 May 2020).

79 United States Department of Justice (2019) *Assets Forfeiture Policy Manual*, available at <https://www.justice.gov/criminal-afmls/file/839521/download> (visited 29 May 2020).

80 See generally Worrall J (2018) *Asset Forfeiture*, available at https://popcenter.asu.edu/sites/default/files/asset_forfeiture.pdf (visited 29 May 2020).

81 Worrall (2018) at 80.

considerably lower standard of proof makes civil forfeiture a more effective approach as compared to criminal forfeiture.

The rationale behind the presumption of unlawful acquisition of the assets in question is that public officers' control and access to public resources puts them at a position of advantage and opportunity which a corrupt public officer may utilise for their private gain against public trust. What constitutes lifestyle audits under the assets forfeiture framework is the investigations that precede the determination of whether or not the suspect is in possession of unlawfully acquired assets which ought to be forfeited to the state. The investigations process involves an inquiry into the various aspects of the living standards and material possessions of the suspect which aspects are the gist of lifestyle audits.

Many countries have enacted laws that provide for the presumption of corruption where a public official is found to be in possession of unexplained assets.⁸² The United Kingdom, India,⁸³ United States of America⁸⁴ and Kenya are among the countries which have adopted civil forfeiture in the fight against corruption. In the United Kingdom, Unexplained Wealth Orders (UWOs) were introduced to the legal system in January 2018 following the passing of the Criminal Finances Act 2017. A UWO in the United Kingdom requires the suspect to explain how an asset was acquired. If such a person does not give an adequate explanation or if he or she does not provide satisfactory proof that the asset is lawfully acquired, the asset is considered 'recoverable property' for the purposes of a civil recovery order under the United Kingdom's Proceeds of Crime Act 2002 (POCA). Significantly, the subject of a UWO need not to have been convicted of an offence or need not have had a civil law judgment against them before a UWO is sought.

82 Pierre J., Gray L., Scott C & Stephenson K (2011) *Asset Recovery handbook: A guide for practitioners*, The International Bank for Reconstruction and Development, Washington, (visited 29 May 2020).

83 The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; Customs Act, 1962; Foreign Exchange Regulation Act, 1973 on confiscation of securities, moneys and properties arising from offences under the Act. See Gujral BB (1983) *Forfeiture of illegally acquired assets of drug traffickers*: The position in India, Bull Narc, 35(2), at pages 41- 48.

84 The USA, Indiana Supreme court in *Timbs v. Indiana* ruled that civil forfeiture clauses are governed under Excessive Fines Clause- forfeiture is constitutional where such property were the "actual means" for committing crime rather "the mere presence of property in a crime." A three-part test was devised to determined constitutionality of civil forfeiture under the Excessive Fines Clause: harshness of punishment, what effect the forfeiture would have on the owner, and severity off the offense.

In Kenya, the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) provides for civil forfeiture of public officers' unexplained wealth to the state as an anti-corruption strategy.⁸⁵ Where a public officer is suspected to be in possession of unexplained assets, the anti-corruption agency, the Ethics and Anti-Corruption Commission (EACC) is mandated to require the person to explain how they acquired the suspect property.⁸⁶ If the public officer is unable to explain the disproportion between their wealth and their known legitimate sources of income, it is concluded that the unexplained assets were acquired as the result of corrupt conduct and the suspect is accordingly ordered to surrender the same to the state.⁸⁷

Kenya's legal framework on civil forfeiture and the fight against corruption was bolstered by the Supreme Court's decision in 2020 in the case of *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission* [2020] eKLR where the Supreme Court affirmed a Court of Appeal decision which had challenged the statutory provisions on forfeiture of unexplained assets. In dismissing the Petitioner's claim that the forfeiture provisions violated his constitutional right to property, the Court affirmed that the right to property does not extend to unlawfully acquired property.⁸⁸

However, the law in Kenya obligates the anti-corruption agency to first identify the specific property which is suspected to be acquired through corruption before requiring a person to explain. Ngumbi has criticized this legal position as impeding effective law enforcement in a country where corruption is deep-rooted in the public sector and internalised by citizens at large as a way of life.⁸⁹ In Kenya, although the law also provides for criminal forfeiture through compensation orders issued against a convict,⁹⁰ civil proceedings for forfeiture have yielded major milestones.⁹¹

85 See Mwangi O "Political corruption, party financing and democracy in Kenya," available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=1874784&jid=MOA&volumeId=46&issueId=02&aid=1874776> (visited 29 May 2020).

86 Section 11 of the Ethics and Anti-Corruption Commission Act (EACC), 2011.

87 Section 55 of the Anti-Corruption and Economic Crimes Act (ACECA), 2003.

88 *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission* [2019] eKLR, Civil Appeal No. 184 of 2018.

89 See Ngumbi (2019) at 13.

90 Section 54 of Kenya's Anti-Corruption and Economic Crimes Act, 2003.

91 Ethics and Anti-Corruption Annual Report for Financial Year 2018/2019.

3.3 Integrity vetting of public officials

The term 'vetting' is derived from the word 'vet' which means 'to make a critical and careful examination of something.'⁹² The term is used in different contexts but popularly to describe the process of assessing the character of a person including their previous dealings.⁹³

In the context of the public sector, vetting is the process of assessing individual integrity to determine one's suitability for employment or other consideration where the integrity of an individual is in issue. Individual integrity refers to the person's compliance with relevant standards of human rights and professional conduct, including a person's financial propriety.⁹⁴

Vetting consists of background verification that attempts to determine whether past behaviour is a matter of concern for the future reliability, loyalty, and trustworthiness of an individual.⁹⁵ The process seeks to exclude from public service persons with integrity deficits so as to strengthen the legitimacy of the institutions in the eyes of the public.⁹⁶ The determination of a person's suitability is not an end in itself but part of the broader institutional reforms to address governance challenges in public institutions.

Given that the vetting process involves an inquiry into the conduct of the individual being vetted, lifestyle audits form a critical component of any vetting process. If properly anchored in a legal framework, vetting has the potential to address governance challenges through deterrence of corrupt conduct. This was illustrated in Kenya where the National Assembly, upon integrity vetting, rejected a candidate nominated by the President to be appointed as the Chairperson of Kenya's Salaries and Remuneration Commission (SRC) on grounds that the candidate was facing corruption charges in court.⁹⁷

92 Hornsby AS (2010) *Oxford Advanced Learner's Dictionary*, Oxford University Press, at 1655.

93 See Imende G (2011) "Vetting of Judges and Magistrates in Institutional Transformation: Lessons from Kenya," LLM Thesis submitted to the University of Nairobi.

94 Ethics and Anti-Corruption Commission (2013) "Vetting Guidelines for Public Officials", EACC, (2013).

95 EACC (2013), at 94.

96 See generally the provisions of Chapter 6 of the Constitution of Kenya and the Leadership and Integrity Act, 2012. This presents an example of prescribed standards of conduct to which vetting may apply.

97 See Kenya National Assembly Report on the Vetting of Nominee for Appointment as Chairperson of the Salaries & Remuneration Commission (2018) in Hansard Report (25/07/2018) pages 6-25, at http://www.parliament.go.ke/sites/default/files/2018-08/Hansard_Report_-_Wednesday_25th_July_2018P.pdf.

Malaysia has adopted an automated vetting mechanism. It has what is referred to as the 'electronic Integrity Vetting System' (eSTK) which manages the integrity vetting process, processed by the Malaysian Anti-Corruption Commission (MACC). The vetting categories apply to ministries, government departments, non-government organisations, private corporations, associations, clubs, and similar entities.

Malaysia's eSTK is an online application process developed to facilitate and expedite the application for integrity vetting to the MACC without requiring physical delivery of such applications. Kenya has also adopted integrity vetting which involves background inquiries into the personal conduct of persons seeking appointment to public office.⁹⁸ This involves aspects of lifestyle audits in the sense that one's lifestyle is evaluated to determine if it has exhibited the integrity standards prescribed in law.⁹⁹

3.4 Monitoring of public officials' financial transactions

Countries often establish frameworks to monitor financial transactions of individuals and organisations in local and foreign bank accounts for various purposes.¹⁰⁰ One of the major reasons for monitoring bank accounts is to detect and prevent illicit financial flows in the prevention of corruption and other criminal activities such as financing of terrorism, money laundering, and tax evasion.¹⁰¹

Kenya is among the countries with such frameworks. Under Kenya's Proceeds of Crime and Anti-Money Laundering Act, 2017 (POCAMLA), reporting institutions under the Act, are required to 'monitor on an ongoing basis all complex, unusual, suspicious, and large or other transactions as may be specified in the regulations.' They are to report these transactions to the Financial Reporting Centre (FRC)¹⁰² established under the Act. FRC is an independent body whose

98 See Sec 12A of Kenya's Leadership and Integrity Act and the Public Appointments (Parliamentary Approval), 2013.

99 Chapter 6 of the Constitution of Kenya, 2010 on Leadership and Integrity Act.

100 See Western Balkans Recommendation (2011) "Banking secrecy should not be an obstacle to using banking data for verification purposes."

101 Open Society Justice Initiative (2015) *Repatriating Stolen Assets: Potential Funding for Sustainable Development*, at <https://www.justiceinitiative.org/uploads/59e79b54-69fa-46fd-a9d7-7699729ed8c4/repatriating-stolen-assets-background-20150727.pdf> (visited 23 May 2020).

102 An independent body established under section 21 of Proceeds of Crime and Money Laundering Act, 2017 to assist in the identification of the proceeds of crime and combating money laundering. Its mandate includes provision of financial information to investigative agencies.

principal objective is to assist in the identification of the proceeds of crime and combating money laundering.¹⁰³ Its mandate also includes provision of financial information to investigative agencies.

Further, the Central Bank of Kenya (CBK) has formulated Guidelines relating to 'hard' currency payments out of Kenya that are relevant to lifestyle audits. Pursuant to these Regulations, payments out of Kenya below US\$ 10,000.00 can be made freely. Payments out of Kenya between USD 10,000.00 and US\$ 499,999.00 require evidence of the purpose of the payment being made to be provided to the remitting bank.¹⁰⁴

It may be argued that provisions of this nature can form a good basis for lifestyle audits of persons suspected of corruption and other (economic) crime in both the public and the private sector.¹⁰⁵

3.5 Income tax administration regimes

Governments primarily generate revenue through collection of taxes. In order to prevent pilferage of government revenue through tax evasion and other corrupt practices, there ought to be appropriate mechanisms established within the tax administration regime for that purpose.¹⁰⁶ Such mechanisms mainly target the systems of the tax administration regime, officers involved in tax collection and persons liable to pay taxes.

One of the mechanisms for accountability in a revenue management regime is the administration of a lifestyle questionnaire as has effectively been implemented in South Africa. Despite the absence of a specific framework on lifestyle audits, the South Africa Revenue Service (SARS) regularly administers

103 Established by Sec 21 of Proceeds of Crime and Anti-Money Laundering Act, 2017.

104 Central Bank of Kenya (2013) "Prudential Guidelines on Minimum Security Standards," CBK, Nairobi.

105 Other relevant laws in this area include the Central Bank of Kenya Act [1966], the Banking Act [1991, revised edition, 2012], and the Income Tax Act [1996, revised edition 2012] and the proposed Tax Amendment Bill [2020]. The Central Bank of Kenya (CBK) has formulated 'Prudential Guidelines on Minimum Security Standards' relating to "hard" currency payments out of Kenya that provides that payments over U.S \$ 500,000.00 have to be notified by the remitting bank to the CBK. Under the Income Tax Act, the Commissioner of Income Tax is empowered to investigate the sources of income of a person suspected of evading taxes, whereby his income tax returns do not correspond to his lifestyle.

106 See the World Bank website at <https://blogs.worldbank.org/governance/chasing-shadows-tax-strategies-tackle-shadow-economy> (visited June 18, 2020).

lifestyle questionnaires on taxpayers including individuals, charities and businesses.¹⁰⁷

In 2011, South Africa enacted the Tax Administration Act which empowers the South African Revenue Service (SARS) to require persons to submit relevant material or information concerning their lifestyle and wealth.¹⁰⁸ In this case, the tax agency conducts audits on taxpayers, business trusts and individuals to determine if the living expenses and practices of the taxpayers are consistent with the declared income and assets in the names of the taxpayers.¹⁰⁹ This helps to certify that each taxpayer is fully remitting their taxes¹¹⁰

The questionnaire poses various questions about one's lifestyle, how one maintains it and where they get their funds from. The issuance of questionnaires may be triggered by various incidents including the submission of incorrect tax returns to the revenue authority or due to reporting of any suspect corruption related transactions such as possession of unexplained wealth.¹¹¹ The questionnaire helps shed light on whether one's income can legitimately accommodate their reported monthly living expenses.¹¹²

The South African revenue authority also conducts risk profiling of individual taxpayers through a variety of means including using data from third parties such as banks. This may indicate a discrepancy between the income declared by such a taxpayer and their actual assets or income. The identification of such discrepancy makes the concerned individual a candidate for a lifestyle audit.¹¹³

When risk-profiling a suspected taxpayer, a variety of information is used by SARS including third party data, and risk rules which help in identifying potential discrepancies between income declared by a tax payer and the income and assets they are thought to have. If a discrepancy is identified, a taxpayer is selected for

107 Temkin S (2012) "Long arm of the SARS lifestyle audit police," (Business Day, 2012), at <https://allafrica.com/stories/201003010914.html> (visited June 19, 2020).

108 Sec 46(1) of the Tax Administration Act, 2011.

109 Sec 46(1) of the Tax Administration Act, 2011.

110 Temkin (2012) at 99.

111 Temkin S (2011) "Lifestyle audits for ordinary citizens too," *Business Day Online*, 8/9/2011, at <http://www.businessday.co.za/articles/Content.aspx?id=152806> (visited June 18, 2020).

112 The draft framework for conducting lifestyle audits on public service employees in South Africa was yet to be approved by the Minister as at this writing.

113 Ngalwa S & Malefane M (2011) "Hawks ask for Malema records in trust fund probe," *Sunday Times Live*, at <https://www.timeslive.co.za/politics/2011-07-31-hawks-ask-for-malema-records-in-trust-fund-probe/> (visited 17 May 2020).

audit.¹¹⁴ Private information is sought legitimately by formally approaching banks and cell phone companies to request the records of suspects regarding lifestyle audits into their alleged questionable wealth. This forms part of preliminary investigation undertaken to determine whether the suspected individuals are guilty of fraud or not.¹¹⁵

A lifestyle questionnaire is usually used to obtain information from a taxpayer and together with other information sources, it helps SARS in matching the lifestyle trends, income streams, and the asset base of a tax payer, to what has been declared in an income tax return form.¹¹⁶ In Kenya, similar questionnaires were administered during the lifestyle audit of senior procurement and accounting officers in Government Ministries, Departments and Agencies (MDAs).¹¹⁷

Remarkably, every country has a revenue collection and administration agency. By virtue of their mandates, such agencies keep custody of crucial information about the wealth of individuals which is central in any lifestyle audit process. The agencies have the capacity to detect corruption while executing their mandates of assessment, collection, and accounting for public revenue. This makes income tax administration a potentially effective lifestyle audit mechanism which should be explored by countries to shift the anti-corruption focus to the material possessions of an individual.¹¹⁸

114 Temkin (2012) at 107.

115 Ngalwa, S. & Malefane, "Hawks ask for Malema records in trust fund probe" Sunday Times Live, (Web Page, 31 May 2020) <<http://www.timeslive.co.za/politics/2011/07/31/hawks-ask-for-malema-records-in-trust-fund-probe>>

116 Croome B (2010) "SARS' lifestyle audits dig deep to find hidden assets," Business Law & Tax Review, Tax Bites, Web Page, 31 May 2020) <http://www.ens.co.za/images/news/12_04_10%2001%2001r1204LAW_AL_5.pdf>, (visited June 13, 2020). See also Gillespie, RT (2014) "The best practices applied by forensic investigators in conducting lifestyle audits on white collar crime suspects," Doctoral dissertation, University of South Africa.

117 In June 2019, President Uhuru Kenyatta directed the lifestyle audits of all heads of accountants and procurement. Questions were however raised, especially with regards to why- the Ethics and Anti-Corruption Commission (EACC)-constitutionally mandated to tackle corruption in Kenya-was not involved in the lifestyle audit process. See Edwin Mutai (2019) "Rotich in trouble over lifestyle audit hitch," *Business Daily*, 25/6/2019, at <https://www.businessdailyafrica.com/economy/Rotich-in-trouble-over-lifestyle-audit-hitch/3946234-5171618-o93lgxz/index.html> (visited June 19, 2020).

118 Income tax regimes prove to be a viable means of ensuring that ill-gotten wealth by public officers is reinstated to taxpayers. See Ibrahim Khalif (2019) "Enforce lifestyle audits through tax statutes," *The Standard*, 5/3/2019, at

4. CHALLENGES TO EFFECTIVE DEPLOYMENT OF LIFESTYLE AUDITS AS AN ANTI-CORRUPTION TOOL

Lifestyle audits are not entirely fool proof and reliable or without challenges, principally owing to their nature. There are six (6) challenges in this regard.

First, lifestyle audits involve an examination and inquiry into an individual's personal and commercial affairs, which are private. Privacy rights are normally constitutionally protected in most jurisdictions,¹¹⁹ and therefore legal challenges can arise where the constitutionality of statutory laws permitting lifestyle audits is challenged in court.¹²⁰ The auditing process could be stopped unless the statutory legal framework is properly aligned to the Constitution.

The challenge is compounded further when the person being investigated is not a public officer. For instance, the requirement that wealth owned by a suspect together with his wife and children must be declared, still raises the issue of the infringement of the privacy rights of persons who are not public officers. Generally, it is acknowledged by Ben Sihanya and other scholars that 'whenever there is an inconsistency between the Bill of Rights and statutory provisions, the Bill of Rights clause reigns supreme.'¹²¹

<https://www.standardmedia.co.ke/article/2001315223/enforce-lifestyle-audits-through-tax-statutes> (visited June 18, 2020).

119 Some examples include, Article 31 of the Constitution of Kenya 2010 on the right to privacy; Article 18 of the Constitution of Ghana which states that, "no person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others," and the 4th, 5th 14th Amendment in the Constitution of United States which however much not express, contain provisions that imply the right to privacy.

120 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy..." We recognize the fact that this provision is not absolute but rather primarily seeks to protect citizens from "arbitrary and unlawful interference" with their privacy.

121 See Ben Sihanya (forthcoming 2021) "Conceptualising sovereignty, constitutions, states and governments in Kenya and Africa," in Ben Sihanya (2021) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 2: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya, at 3.

It is an established principle that when weighing the public interest against individual rights and freedoms, a greater level of caution has to be exercised.¹²² Eric Ngumbi, however, opines that the guiding principle in constitutional interpretation should be that the wider public good and interest in a corruption-free country supersedes individual rights and freedoms. Furthermore, it must be noted that corruption is an obstacle to the realisation of other constitutional rights. According to Ngumbi, some constitutionally protected rights can be a major impediment to effective anti-corruption law enforcement especially in countries like Kenya and Nigeria with an entrenched culture of corruption and impunity. In these countries corruption is deeply institutionalised and internalised as a way of life by some citizens.¹²³ The limitation of constitutional rights, in appropriate cases, would therefore facilitate effective investigations and prosecution, making corruption a high risk venture.

In Kenya's context for instance, when exercising prosecutorial powers, the DPP is required under the Constitution to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.¹²⁴ The *Black's Law Dictionary* defines public interest as 'the general welfare of the public that warrants recognition and protection' or 'something in which the public as a whole has a stake, especially an interest that justifies governmental regulation.'¹²⁵

At the same time, privacy rights are constitutionally protected in the Constitution of Kenya 2010 and in constitutions of many other African countries.¹²⁶ As a result, constitutional challenges on privacy versus public interest always arise whenever law enforcement agencies seek to prosecute corruption cases. In *Director of Public Prosecutions v. Prof. Tom Ojienda & Others*,¹²⁷ Kenya's Court of

122 See Jack Mwimali (2019) "Dilemmas in operationalising the right to fair trial, *The Platform*, Nairobi, 28-28.

123 The deep rooted nature of corruption in Nigeria is confirmed in Maíra Martini (2014) "Overview of Corruption in Nigeria," Transparency International, available at https://www.transparency.org/files/content/corruptionqas/Nigeria_overview_of_corruption_and_influence_of_social_norms_2014.pdf (visited 30/6/2020).

124 Article 157(11) of the Constitution of Kenya, 2010.

125 *Black's Law Dictionary*, 9th Edition, at 1350.

126 Section 14 of the Constitution of South Africa; Article 18(2) Ghana Constitution.

127 *Director of Public Prosecutions v. Prof Tom Ojienda & Others*, Civil Appeal No. 109 of 2016.

Appeal delivered a judgment upholding a decision of the High Court¹²⁸ which had declared searches conducted by law enforcement agencies in the course of investigations to be illegal unless the suspect is issued with an advance notice of any impending search.

The Petitioner who was then a Member of the Judicial Service Commission, had obtained Judicial Review (JR) orders in the High Court quashing search warrants obtained by the EACC. The EACC was investigating the Petitioner's bank account for alleged corruption. Both the Court of Appeal and the High Court agreed with the Petitioner that the search warrants were illegal as they violated section 28 of Kenya's Anti-Corruption and Economic Crimes Act, 2003 which entitled the Petitioner to be notified of an intended application to access or investigate his bank records.

At the time of writing, a final appeal on the matter was pending determination at Kenya's apex court, the Supreme Court which had temporarily suspended implementation of the Court of Appeal judgment.

The import of protecting privacy rights against lawful investigation of corrupt conduct could be inimical to lifestyle audits. In the Kenyan case, prior to suspension of the Court of Appeal decision by the Supreme Court, the decision had the dangerous effect of invalidating all concluded and ongoing corruption investigations where the accused person had not been notified before a search of their property. Such notice has the inevitable consequence of permitting suspects to conceal or destroy evidence. This could adversely affect the fight against corruption through lifestyle audits as it makes it difficult to obtain incriminating evidence against persons suspected of looting public funds. An interpretation that favours enforcement of anti-corruption laws in the public interest would thus bolster the war against corruption.

This article reconciles the perspectives of the -authors to argue that in conducting lifestyle audits, a delicate balance should, of necessity, be maintained between the need to protect the sacrosanct nature of constitutional rights including the rights to privacy, bail, presumption of innocence and silence on one hand, and the acknowledgement of the overwhelming public interest in an effective fight against corruption, on the other. This discourse is part of an ongoing

128 *Tom Ojienda t/a Tom Ojienda & Associates Advocates v. Ethics and Anti-Corruption Commission & 5 Others* [2016] eKLR Petition No.51 of 2015 available at <http://kenyalaw.org/caselaw/cases/view/118365/>. (visited on 9/10/2019).

debate towards constitutional reform in Kenya under the auspices of the Building Bridges Initiative (BBI)¹²⁹ where anti-corruption reforms feature as a key issue under consideration.

Second, lifestyle audits are best suited for grand and political corruption cases which involve huge sums of money, money laundering and other illicit activities where significant amounts of money are involved. Lifestyle audits can be counterproductive and of little economic sense if conducted on an individual who may have engaged in malfeasancess leading to loss of small amounts of money as the cost of the process may be more than what is recovered. More importantly, lifestyle audits hardly uncover small currency transactions such as those of consumables or one-time medical bills.¹³⁰ Given the prevalence of corruption in most African countries however, there is a need for revamped strategies such as lifestyle audits.

Third, lifestyle audits are not conclusive or dispositive of the commission of a financial or economic crime or corruption.¹³¹ Lifestyle audits can only provide indicators or pointers that something is amiss.¹³² This is because in some instances, the apparent flamboyant lifestyle that appears disproportionate to one's income may be explained away.. It is possible that one has some other income stream, assets, or inheritance which is not known by the investigators and which may be lawful and legitimate.¹³³ This challenge can be circumvented by ensuring that the focus of lifestyle audits goes beyond the obvious display of opulence and expenditure. For instance, the auditing of the worth of an individual should incorporate assets that are not reported in government records and those kept in foreign countries. This calls for a comprehensive legal lifestyle audits framework.

Fourth, given that most financial crimes are complex and sophisticated and the suspects are able to hide their assets in foreign jurisdictions, lifestyle audits can

129 The BBI is an initiative aimed at addressing various national challenges that have afflicted Kenya since independence, through appropriate constitutional reforms. The initiative was borne out of a political stability agreement between President Uhuru Kenyatta and Chief Opposition Leader Raila Odinga, who served as Kenya's Prime Minister between 2008-2013. The truce was signified through a handshake between the two on 9th March 2018. Major constitutional reforms are anticipated in Kenya through the BBI process.

130 Association of Certified Fraud Examiners (2011) *Fraud examiners manual*. Austin, TX: The Association, available at <https://www.acfe.com/> (visited June 19, 2020).

131 Coenen TL (2009) *Expert fraud investigation*. A step-by-step guide, Hoboken, NJ: Wiley.

132 Olusola (2009) at 34.

133 Olusola (2009) at 34.

be very expensive thus requiring substantial resources and highly specialised investigation skills. The implication is that a state agency charged with conducting lifestyle audits must be properly resourced, both financially and technically. This is a major demand for Kenya and countries with resource challenges especially in Africa. However, considering the huge amounts of public resources lost through corruption as analysed earlier in this article, the capital intensive nature of lifestyle audits can be justified.

Fifth, lifestyle audits primarily rely on the obvious display of opulence. Account is thus not taken of the fact that it is possible for a corrupt individual to exhibit a lifestyle that does not fully accord to the income and assets in their possession. One may maintain a modest lifestyle below their worth and in the absence of alternative evidence of their material wealth, illicit enrichment may not be immediately or easily detected. With this awareness, lifestyle audit frameworks could be designed in a manner that enables detection of any corrupt or unlawful possession of wealth. For example, a lifestyle audit regime that includes effective monitoring of bank accounts held locally or abroad could help in exposing illicit wealth that may not necessarily be detected from an individual's lifestyle. Further, the said challenge could be addressed by ensuring that lifestyle audits should be handled by credible, ethical and professional auditors and personnel who have the expertise to unravel and discover fraud and corruption even by employees who maintain a very modest lifestyle but secretly engage in fraud and corruption.¹³⁴

Sixth, lifestyle audits may not be effectively deployed in the absence of a reasonable degree of political will especially in African countries where most of the perpetrators of political corruption hold office in the state agencies that are responsible for enactment or implementation of anti-corruption policies and laws, including those governing lifestyle audits. Lifestyle audits could thus be politicised impeding their effective implementation. For example in South Africa, attempts to anchor lifestyle audits in the anti-corruption regime have been politicised and are mainly resisted by political office holders.¹³⁵ In order to be effective therefore, lifestyle audits should go hand in hand with the practice of constitutionalism and proactive participation of citizens, civil society and the media in governance processes.

134 Kola Olusola Odeku (2019) Unmasking Life-Style Audit as a Proactive Mechanism to Root Out Corruption: The Case of South Africa, Volume 22, Issue 6, 2019 *Journal of Legal, Ethical and Regulatory Issues*.

135 Odeku (2019) at 134.

Given that the above shortcomings to the effective deployment of lifestyle audits can be navigated at least as proposed in their analysis, lifestyle audits remain a viable tool that should be adopted and developed in revamping anti-corruption strategies especially in Africa where corruption is widespread and deep-rooted.

5. IDEALS OF AN EFFECTIVE LIFESTYLE AUDITS FRAMEWORK

From the analysis above, it is clear that lifestyle audits focus on the integrity of the wealth of an individual as exhibited in their lifestyle(s). This is predicated on the argument that human beings are ordinarily in the pursuit of happiness and the pursuit of material wealth is meant to actualise that happiness. The motivation of a person in the acquisition of wealth, whether lawfully or unlawfully, is the desire to enhance the quality of their lifestyles and in some cases, those of their associates. Therefore, it follows that the lifestyle of an individual is a reliable measure of an individual's worth and critical source of information for corruption investigations.

In order to utilise lifestyle audits as a tool for effective corruption investigations, the support framework must be sufficient to address all relevant aspects of the material wealth of an individual, how the same is utilised and any external factors germane to the audit process.

On the basis of these findings, this article recommends a toolkit of ten basic tenets and principles which properly characterise an effective lifestyle audits framework.

First, lifestyle audits should be provided for in A specific legislation dedicated for that purpose. This could be done by consolidating into one law all aspects relating to the wealth of an individual as earlier identified under Part 3 of this article. These include the aspects of verification of assets under the assets disclosure regime, monitoring of reported income tax, regulation of bank accounts held by public officials in foreign countries, integrity checks for public officials in relation to their acquired wealth, and monitoring proactive financial transactions of persons of interest. Consolidation of these and other related aspects into one law is essential since the alternative approach of fragmentation under different laws can impede focused, efficient, coherent and consistent implementation of lifestyle audits.

Second, the legislative focus of a lifestyle audit framework should primarily be the determination of the integrity of the accumulated material wealth of an individual as the key driver of one's lifestyle. Other matters germane to the wealth but not intricately linked to the lifestyle audit process such as guilt of the individual

could be left for the general anti-corruption frameworks. A lifestyle audit is mainly an investigative process which need not lead to a determination of guilt on the part of the person in possession of unexplained wealth. It is largely an inquiry into whether the subject's wealth was acquired lawfully in order to inform recovery and return to the public.

Third, the framework should provide for inquiry into the wealth of an individual over and above the obvious display of opulence. This is because people may not necessarily use what they have corruptly received or stolen to finance their lifestyles. It is possible that a person may adopt a modest lifestyle despite having large amounts of money hidden out of the reach of law enforcement agencies. It is therefore not sufficient to focus on one's wealth as known or reported in Government records.

Fourth, a proper lifestyle audit regime should include an effective and sound institutional framework. Particularly, there is need for a centralised institutional framework that takes charge of the entire exercise, preferably the agency that deals exclusively with the fight against corruption. Charging multiple agencies with the task of executing lifestyle audits may not be effective especially in Kenya and other African countries where corruption is deeply rooted and institutions are not properly developed.¹³⁶

The central agency charged with implementing lifestyle audits should have sufficient powers, resources and an independent operational space. It should have powers to access information without unnecessary restrictions. For instance, Eric Ngumbi argues that it should be able to access an individual's bank account statements without first having to seek a court order. A classic example is the success of Indonesia's Corruption Eradication Commission (KPK), attributed to its legal powers to access a number of state databases, including automated links. The agency can also directly access banking data of a public official for the purpose of verifications.

136 These institutions should be constitutionally protected, and to have the force of the law. For instance, the Constitution of Uganda, Article XXVI (iii) on accountability states that "all lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices." Such 'lawful measures' must therefore explicitly provide for prosecution of suspects and safeguard of all institutions tasked with fighting corruption.

Fifth, there should be mechanisms for collaboration between the main agency charged with conducting lifestyle audits and other government agencies.¹³⁷ This is because in every circumstance, there is relevant information held by various agencies such as revenue authorities concerning the wealth of individuals. The law could provide for how relevant information held by other government agencies could be obtained by the central agency or proactively channelled to the agency with ease.

Relatedly, the lifestyle audit framework should prescribe clear roles for other key actors outside the government, for instance, the public, media, civil society organisations and citizens. The framework should also have mechanisms for international cooperation where lifestyle audits involve trans-border aspects.

Sixth, the framework should combine both reactive and proactive approaches. The legal and administrative frameworks should be designed to ensure that the law enforcement agencies do not have to wait until a person has stolen and adopted a questionable lifestyle that can trigger investigations. A proactive approach especially targeting officials working in areas prone to fraud can be done randomly to prevent and disrupt any potential theft through early detection. This would protect public funds before they are embezzled.

Seventh, lifestyle audits should be constitutionally protected. If solely enacted under statutory law without an underpinning in the supreme law of the land, they could face the danger of legal challenges on the ground of their potential unconstitutionality. This is because lifestyle audits are intrusive in nature and could constitute a violation of constitutional rights such as privacy.¹³⁸ The frameworks should be hinged on strong enabling legal frameworks that vest some evidentiary burden of proof on the person alleged to be in possession of assets that are disproportionate to their known income. The frameworks should effectively distinguish the evidentiary burden to prove lawful acquisition of property from the requirement to prove innocence.

In addition, in order to ensure efficient inquiries, the law should have provisions requiring a suspect to enumerate and subject all their wealth to the

137 See also Munjeyi E & Mujuru S (2018) "Is it worth investing in "Lifestyle audit" in Zimbabwe?" *International Journal of Innovative Research in Science, Engineering and Technology*, Vol. 7, Issue 8, August 2018, at <http://www.ijirset.com/volume-7-issue-8.html> (visited June 19, 2020).

138 The lifestyle audits must also be conducted in a manner that respects the individual's right to fair administrative action. See Article 47(1) of the Constitution of Kenya, 2010 and Section 4 of the Fair Administration Act, Kenya.

audit process whenever so required, without offending constitutional rights such as the right against self-incrimination. The understanding is that an individual may be better placed to explain all that they own and how they acquired it.

Eighth, national systems for data storage, management and analysis of incomes and assets of citizens should be automated. This is especially critical in the assets disclosure and income reporting regimes. Adequate utilisation of technology could bolster accuracy and timeliness in the detection of irregularities in the wealth of an individual as well as facilitate seamless information sharing among agencies involved in the enforcement of lifestyle audit laws.

Ninth, the lifestyle audit net should be cast wider to cover public, private and 'voluntary' (or non-profit or public benefit) sectors. This is due to the strong public-private sector corruption nexus where actors in the private sector fuel corruption in the public sector through collusion with public officials.¹³⁹ Where it is reasonably suspected that a private sector person is in possession of wealth believed to be stolen from public coffers, albeit indirectly, the framework should have provisions for such persons to be held accountable too. Tax evasion is a classic example of corrupt practices facilitated by collusion between actors in the public and private sectors.¹⁴⁰

Tenth, asset disclosures under an effective lifestyle audits framework should be at fairly short intervals, publicly done, and with clear verification procedures and proactive monitoring of changes or fluctuations in the wealth of a person. This would ultimately reduce the chances of illicit enrichment.

Conscious that appropriate laws on their own cannot entirely be a panacea for illicit enrichment, implementation of the lifestyle audits toolkit requires an enabling political environment. Political will is essential. This article contends that the Presidency or executive premiership, in many countries, is at the centre stage of the political commitment necessary for an effective war against corruption. For instance, the United Nations Office on Drugs and Crime (UNODC) in early 2020, expressed its recognition of President Uhuru Kenyatta's intensified efforts in

139 The Kenya Private Sector Alliance (KEPSA) energy and extractives sector board Chairperson, James Mwangi said "the institutions mandated to carry out life style audits must be independent and also have the capacity to carry out audits without fear or favour." See Zachary Ochuodho (2020) "Corruption: Why private sector wants lifestyle audits revived," *People's Daily [PD]*, 24/1/2020, at <https://www.pd.co.ke/business/economy-and-olicy/corruption-why-private-sector-wants-lifestyle-audits-revived-21559/> (visited June 19, 2020).

140 Ngumbi (2019) at 13.

fighting corruption.¹⁴¹ Globally, the test of the role and commitment of Presidents towards fighting corruption can also be seen from the intensified focus on Ukrainian President, Volodymyr Zelensky's efforts in fighting deeply-institutionalised corruption in Ukraine, and the opposition he is facing in this fight.¹⁴² These examples demonstrate that the Presidency or Premiership is the embodiment of the political fulcrum or will in the implementation of anti-corruption strategies.¹⁴³ This is especially in Kenya and other African countries where the Presidency or Premiership retains enumerated (and problematic residual or implied) powers of influence over the entire governance architecture, including political parties and hence Members of the Legislature. This is despite the existence of independent institutions.¹⁴⁴ More often than not, functional independence of such institutions only exists on paper. In such countries, particularly in Africa, the Presidency or Premiership holds the key to constitutionalism and an effective fight against corruption, and could rightly be regarded as the premier anti-corruption authority.

The import of this argument is that if the Presidency were to proclaim that there shall be no more corruption, so shall it be. The converse is also true. Whether governance systems would work effectively or not is a question at the centre of the Presidency or Premiership of any country. As such, Presidents and Premiers play a major role in inferring the quality of laws enacted, ensuring their full implementation, creating an enabling political environment and adopting a zero-

141 United Nations Office on Drug and Crime (2020) "UNODC welcomes President of Kenya's renewed anti-corruption pledge," at <https://www.unodc.org/easternafrika/Stories/unodc-welcomes-president-of-kenyas-renewed-anti-corruption-pledge.html> (visited June 19, 2020): Pursuant to article 131(2) of the Constitution of Kenya 2010, the President has an inherent mandate to respect and uphold constitutional values and principles including national values and principles of governance under article 10, and the leadership and integrity principles under chapter 6.

142 Anton Troianovski (2020) "Ukraine's President Said He'd Fight Corruption. Resistance Is Fierce," *New York Times*, 19/1/2020, at <https://www.nytimes.com/2020/01/19/world/europe/zelensky-ukraine-corruption.html> (visited June 18, 2020).

143 Ojwang JB (1990) *Constitutional Development in Kenya: Institutional Adaptation and Social Change*, African Centre for Technology Studies (ACTS), Nairobi.

144 See Ben Sihanya (forthcoming 2021) "Fusion and separation of powers, and checks and balances in Kenya and Africa," in Ben Sihanya (forthcoming 2021) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

tolerance policy against corruption in government.¹⁴⁵ However, in developed jurisdictions where institutions work with minimum interference from the executive and external forces, it is enough for a country to have in place strong institutions that are keen on implementing anti-corruption laws.

6. CONCLUSION

This article has explored the rationale behind lifestyle audits as an emerging strategy for fighting corruption in the public sector especially in Kenya and other African countries where the vice is deep-rooted. It is noted that no country has so far developed legislation purely dedicated to lifestyle audits encompassing all lifestyle audit elements including verification of assets under the asset disclosure regime, monitoring of reported income tax, regulation of bank accounts held by public officials in foreign countries, integrity checks for public officials in relation to their acquired wealth, and monitoring proactive financial transactions of persons of interest.

Most of the existing frameworks across the globe focus on systems integrity of public entities and personal integrity of their public officials. To date, countries that have included lifestyle audit provisions in their laws have done so in a piecemeal and fragmented manner.

The approach of focusing anti-corruption interventions on the integrity of the wealth of public officials is an emerging strategy that is not fully developed in the African and global efforts to fight corruption. It is therefore opportune for the adoption and development of comprehensive frameworks specifically dedicated to lifestyle audits. Focusing the fight against corruption on the integrity of an individual's material possessions effectively takes away the motivation for illicit accumulation of wealth if there exist strong systems requiring persons to account for what they own or else lose it to the state. The ideals of an effective lifestyle audit framework presented under Part 5 of this article, if effectively implemented

145 See the 2015 Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya at <https://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf> (visited June 19, 2020). Among the various recommendations in the report, the Taskforce recommended the amendment of the Public Audit (Amendment) Bill through the addition of subsection 9(1)(a) to allow the sharing of information with law enforcement agencies where the Auditor General considers such information as to disclose reasonable grounds to suspect fraud or corrupt conduct.

could significantly bolster the fight against public sector corruption not only in Africa but also the rest of the globe.